Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

NO. 77 - 1428

YESTERDAY'S CHILDREN, A Not-For-Profit Corporation, CYNTHIA DOE, JEANINE DOE, BEVERLY DOE, JUDY DOE, KAREN DOE, M. JANE DOE, VERONICA DOE, JAMES DOE,

Petitioners,

- VS -

MARGARET KENNEDY, Director, Illinois Department of Children and Family Services, HARRY COMERFORD, Presiding Judge, County Division, Circuit Court of Cook County, PAUL Q. PETERSON, Director, Illinois Department of Public Health, STANLEY KUSPER, Clerk, Cook County, and WILLIAM SCOTT, Attorney General of Illinois,

Respondents.

SUPPLEMENTAL APPENDIXES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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APPENDIX 4

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

YESTERDAY'S CHILDREN, a not-for-profit Illinois corporation, et al.,	)	
Plaintiffs,	)	
v.	)	NO. 75 C 378
MARY LEE LEAHY, Director, Illinois Department of Children and Family Services, et al.,	)	
Defendants.	)	

DECISION ON MOTION TO DISMISS

As noted in our decision dated June 9, 1975 which declined to convene a three-judge court, all of the defendants have filed motions to dismiss the complaint in this case. The parties have filed additional memoranda in support of the motions, and the plaintiffs' memorandum also contains a motion to reconsider our order of June 9, 1975. It also points out that the present action is no longer a class action, since an amended complaint was filed February 11, 1975.

This eliminates one problem but does not go to the ultimate merits.

After fully considering the memoranda and the motions, we find and conclude that the amended complaint should be dismissed on the grounds of abstention. This of course will not preclude the plaintiffs from filing an action on the merits in the State court, which is the forum where their cause of action should first be decided.

The pending complaint seeks to test the constitutionality of an Illinois statute which does not make it mandatory that adoption files be impounded, but specifically leaves this up to the State court's discretion. 1973 Ill. Rev. Stat., Ch. 4, §9.1-18. Furthermore, the State court judge has entered a general order impounding the records at least until released for good cause, as alleged in §24 of the complaint. As has often been decided, a State court has the inherent power to impound its records, subject to inspection by proper persons. Husband C v.

Wife C, et al., 320 Atlantic 2d 717, 723-4 (Del. Supr. 1974). Therefore, even if we were to decide that the Illinois statute deprives the plaintiffs of their constitutional rights, we would still be confronted with the general order issued by the Circuit Court of Cook County under its inherent power. Plaintiffs do not specifically seek relief against that order, and of course their primary relief lies in an appeal therefrom.

The principal reason why we believe abstention is the proper course to follow in this case, however, is that the complaint involves a basic question of State public policy which has not been passed upon by the State courts, i.e., whether the plaintiffs should generally be deprived of access to the record of their personal origins. It is not the function of this court to decide public policy for the State of Illinois or for its judiciary, and we will not assume that the State courts will decide such issues contrary

to the Constitution of the United States. Therefore the plaintiffs and the organization representing them should apply to the State courts for relief and let those courts decide whether the statute and the general order deprives them of any rights under the Illinois or Federal constitutions.

The plaintiffs have not filed such an action and allege that it would be futile. This is more of an assumption then we can make under the circumstances. Plaintiffs admit that some records concerning adopted children are released for proper cause shown. One of the issues which should be decided by the State courts, presumably, is what are the confines of proper cause, as well as whether general impoundment is per se unconstitutional.

The plaintiffs are well aware of the doctrine of abstention but rely upon such cases as Zwickler v. Koota, 389 U.S. 241 (1967) where actual prosecution had been completed and fragile First

Amendment rights were involved; see also Younger v. Harris, 401 U.S. 37 (1971). The Supreme Court of the United States has recently emphasized the desirability of abstention when a State's policy is unsettled, however, as in Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). Although we realize that the case at bar is one step removed from the foregoing decisions in that no State court action is pending or even contemplated by the plaintiffs, we believe the principle of comity requires the same result. See Reetz v. Bozanich, 397 U.S. 82 (1970); Koehler v. Ogilvie, 53 F.R.D. 98, 104 (3-Judge Court, N.D. Ill. 1971), affirmed 405 U.S. 906 (1971).

An alternative to dismissal would be to retain jurisdiction until the State courts have acted. However, this may never happen if the plaintiffs do not file a State court action. Rather than retaining jurisdiction over this case for an indefinite period of time, therefore, and rather than acting on the motions to dismiss on

their merits or through a three-judge court, the fairest disposition to all concerned is to dismiss the amended complaint on the grounds of comity, leaving the plaintiffs free to take whatever course of action they see fit.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the motions of the defendants to dismiss are granted, without prejudice to the merits.

ENTER:

THOMAS R. McMILLEN
JUDGE, U.S. DISTRICT COURT

DATED: Oct. 24, 1975

APPENDIX 5

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

YESTERDAY'S CHILDREN CYNTHIA DOE, JEANINE DOE, BEVERLY DOE, JUDY DOE, KAREN DOE, M. JANE DOE, and JAMES DOE,	)	
Plaintiffs,	)	
v.	)	
MARGARET KENNEDY, Director, Ill. Dept. of Children & Family Services, HARRY COMERFORD, Presiding Judge, County Div., Circuit Court of Cook County, PAUL Q. PETERSON, Director, Ill. Dept. of Public Health, STANLEY KUSPER, Clerk, Cook County, and WILLIAM SCOTT, Attorney General of Illinois,	)	NO. 75 C 378
Defendants.	)	

D E C I S I O N

This case comes on to be heard by a three-judge court in compliance with an unpublished order entered by the United States Court of Appeals for the Seventh Circuit on May 24, 1976. That order reversed a decision of the trial court which

had declined to convene a three-judge court and had dismissed the complaint for lack of a substantial Federal question.

Subsequent to the Court of Appeals' order, plaintiffs filed a motion for summary judgment to declare unconstitutional certain specified sections of the Illinois Revised Statutes, and defendants re-briefed their original motions to dismiss the Amended Complaint. We now allow the Amended Complaint to be filed and have further amended it to name the newly-appointed State officials. Also, an organization known as The Association for the Protection of the Adoptive Triangle was allowed to intervene and to oppose generalized opening of adoption records. It has joined in the defendants' motions to dismiss.

We have decided that the defendants' motions should be granted on the ground of abstention, that plaintiffs' motion for summary judgment should therefore be denied and that their complaint for a declaratory judgment and injunction should

be dismissed without prejudice. Since there are no other material issues remaining in this case, we also deny plaintiffs' motion for oral argument.

Plaintiffs allege that they are members of an organization known as Yesterday's Children, an Illinois corporation not-for-profit, and were adopted as infants from unknown parents. They allege that they have been unable to obtain vital information on their family origins due to certain Illinois statutes to be set forth hereinafter. Plaintiffs also seek to contest a General Order entered by the presiding judge of the County Division of the Circuit Court of Cook County on February 21, 1974 that " . . . all adoption files in the offices of the Clerk of the Circuit Court shall be impounded and shall be released only upon an order issued from the County Division of the Circuit Court".

Plaintiffs allege that they have attempted to obtain their original birth certificates or otherwise learn their true parentage from various

private adoption agencies and from the Illinois Department of Children and Family Services but have been unsuccessful because these organizations have honored the foregoing Statutes and the General Order of the Circuit Court of Cook County. Plaintiffs have not attempted to obtain a release of their records by order of the Circuit Court, alleging that this would be expensive, time consuming, and futile, "absent medical exigencies" (which are not alleged to exist). None of the adoption agencies are parties defendant, nor is it alleged that they have the information sought by the plaintiffs. Plaintiffs claim that to deprive them of information concerning their "natural heritage" violates their constitutional rights under the First, Fifth, Ninth, Thirteenth and Fourteenth Amendments to the Constitution of the United States.

Chapter 4, §9.1-18 of the Ill. Rev. Stat. (1975) effective January 1, 1960 provides in pertinent part as follows:

Records confidential

* * * * * * * * * * *

Upon motion of any party to an adoption proceeding the court shall, or upon the court's own motion the court may, order that the file relation to such proceeding shall be impounded by the clerk of the court and shall be opened for examination only upon specific order of the court, which order shall name the person or persons who are to be permitted to examine such file. Certified copies of all papers and documents contained in any file so impounded shall be made only on like order.

Chapter 111 1/2 §73-17 of the Ill. Rev. Stat. (1975) effective August 31, 1971 provides in pertinent part as follows:

* * * * * * * * * * *

(2) When a new certificate of birth is established, the actual place and date of birth shall be shown; provided, in the case of adoption of a person born in this State by parents who were residents of this State at the time of the birth of the adopted person, the place of birth may be shown as the place of residence of the adoptive parents at the time of such person's birth, if specifically

requested by them, and any new certificate of birth established prior to the effective date of this amendatory Act may be corrected accordingly if so requested by the adoptive parents or the adopted person when of legal age. The new certificate shall be substitute for the original certificate of birth:

(a) Thereafter, the original certificate and the evidence of adoption, paternity, legitimation, or sex change shall not be subject to inspection or certification except upon order of a court of competent jurisdiction or as provided by regulation.

* * * * * * * * * * *

(4) When a new certificate of birth is established by the State Registrar of Vital Records, all copies of the original certificate of birth in the custody of any custodian of permanent local records in this State shall be transmitted to the State Registrar of Vital Records as directed, and shall be sealed from inspection.

* * * * * * * * * * *

As was pointed out when the original complaint was dismissed, these statutes reflect a basic

policy of domestic relations, a matter of particular concern to the State of Illinois. We are not aware of any decision by the Illinois appellate court in which the application of the statutes has been involved. Nor have the parties found any Illinois reviewing court which has expressed its views in this obviously sensitive area. Plaintiffs have not even asked the Circuit Court of Cook County to review their problem. We are not satisfied that plaintiffs have raised a genuine Constitutional issue, but if they have, there is no reason to believe that the Illinois courts would deprive them of any Constitutional rights which they may have.

Of course the State statute must be potentially consistent with a constitutional interpretation before abstention is proper. Kusper et al., v. Pontikes, 414 U.S. 51 (1973). The defendants and Intervenor suggest that the statutes can be construed so as to allow the Illinois courts to balance the interests of all parties. We agree

with this approach and conclude that the State courts can thus apply the statutes in such a way as to withstand constitutional attack. In any event, authoritative construction by the State courts will define with precision the constitutional questions raised. It remains to be seen whether or not the General Order issued by the Circuit Court of Cook County on February 21, 1974 as applied to specific petitions for release of the records, would survive.

The Supreme Court has not addressed the issue of a right to know one's natural parentage. No absolute right to this information is readily apparent under the Bill of Rights, whereas the Intervenor's interest in suppressing this information is in some respects analogous to the familial privacy protected in Griswold v. Connecticut, 381 U.S. 479 (1965). Nor do we perceive that the status of being adopted places one in a "suspect" classification so as to require a strick scrutiny of the Illinois statutes. See Mathews v. Lucas,

427 U.S. 495, 515016 (1976). Finally, we are not aware of a "fundamental right" to obtain information concerning one's natural parents, either under the First or Ninth Amendments to the Constitution.

The impoundment order entered by the presiding judge of the County Division of the Circuit Court of Cook County is effective in only one of the State's 102 counties. Since the County Division of the Circuit Court of Cook County presumably has the inherent right to suppress any files under its jurisdiction, subject to release upon good cause shown, the order itself does not necessarily reflect statewide policy. Consequently, it may not be a proper subject for review by a three-judge court, absent the Illinois statutes. See Harris County Commissioner's Court v. Moore, 420 U.S. 77, 88 (1975); 28 U.S.C. §2281. In view of our decision to abstain, we leave any review of the court order to the State courts.

In the recent case of Ohio Bureau of Em-

ployment Services et al. v. Hodory, ___U.S.___, 45 U.S.L.W. 4544 at 4546 (May 31, 1977), the Supreme Court noted that there are two primary types of Federal abstention:

> The first, usually referred to as Pullman abstention, involves an inquiry focused on the possibility that the state courts may interpret a challenged state statute so as to eliminate, or at least to alter materially, the constitutional question presented. Railroad Commission v. Pullman Co., 312 U.S. 493 (1941). See Bellotti v. Baird, 428 U.S. 132 (1976). The second type is Younger abstention, in which the court is primarily concerned, in an equitable setting, with considerations of comity and federalism, both as they relate to the State's interest in pursuing an on-going state proceeding, and as they involved the ability of the state courts to consider federal constitutional claims in that context. Younger v. Harris, 401 U.S. 37 (1971).

A leading case on which we rely for abstention is Bellotti, Attorney General of Massachusetts, et al. v. Baird et al., 428 U.S. 132 (1976). The Supreme Court there required a three-judge court to abstain from ruling on the validity of a State statute until the Supreme

Judicial Court of Massachusetts had done so. The statute required parental consent for abortions on minors but also provided that consent could be obtained by court order "for good cause shown" if one or both parents refused to consent. The Supreme Court ruled that the State statute could be construed constitutionally to permit a "mature minor" to obtain a court order without parental consent. Until it became clear that the State courts would prevent this by effectively eliminating the "good cause" provision, thereby achieving unqualified parental veto, the Supreme Court held that Federal constitutional rights were not necessarily violated and that the three-judge court had prematurely declared the statute unconstitutional. It order the matter certified to the Massachusetts Supreme Judicial Court (although this procedure is not available in Illinois).

In Juidice et al. v. Vail et al., ___U.S. ___ 97 S.Ct. 1211 (March 22, 1977), the Supreme Court required abstention when plaintiffs had

failed to exercise their State court remedy. A New York statute permits contempt and imprisonment of judgment debtors who ignore subpoenas in supplemental proceedings. Even on this sensitive Fourteenth Amendment issue of deprivation of personal liberty, the Court reversed a declaratory judgment of the three-judge court for the Southern District of New York which had struck down the New York statute, stating at ___U.S.___, 97 S.Ct. 1218:

> Here it is abundantly clear that appellees had an opportunity to present their federal claims in the state proceeding [f.n. omitted]. No more is required to invoke Younger abstention . . . Appellees need be accorded only an opportunity to fairly pursue their constitutional claims in the ongoing state proceedings, Gibson v. Berryhill, 411 U.S. 564, 577 (1973) . . . and their failure to avail themselves of such opportunities does not mean that the state procedures were inadequate [f.n. omitted]. Presumptively, therefore, the principles which underlie Younger call for dismissal of the action. [emphasis in original].

In the case at bar, plaintiffs admittedly

have failed to contest a State court order which allegedly has been in effect since 1961 in one form or another, asserting that this would be "futile". However, Ch. 4, §9.1-18 provides that the impounded records may be opened "upon specific order of the court", and Ch. 111 1/2, §73-17 (2) (a) also allows inspection of original birth records upon court order. The same section apparently authorizes the State defendants to permit inspection of the original records "by regulation". Therefore, the statutes in our opinion are not "flagrantly and patently violative of express constitutional prohibitions." Huffman v. Pursue, Ltd., 420 U.S. 592, 612 (1975) quoting from Younger v. Harris, 401 U.S. 37 (1971). Plaintiffs should ascertain what the Illinois statutes actually require before they seek to vindicate any alleged Federal constitutional rights in this court. cf. Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 72-5 (1976).

Since there is a State proceeding in which

the matters before us can and should be litigated, we believe that abstention in this case apparently falls under both of the doctrines identified in the Ohio Bureau decision (supra p.7). Plaintiffs contend, however, that the Court of Appeals' unpublished Order of May 24, 1976, decided the issue of abstention. The Court therein said that abstention was improper in this case. This conclusion was dictum, however, in light of the fact that the Court was merely reviewing the need to convene a three-judge court in this case. In deciding that a three-judge court was required, the Court of Appeals exhausted its jurisdiction. Stamler v. Willis, 371 F.2d 413 (7th Cir. 1966). Notwithstanding the nature of the observations on abstention in the May 24 order, we have carefully considered the Court's analysis and note that it did not have the benefit of the subsequent Supreme Court decisions referred to above. See also Trainor v. Hernandez, ___U.S.___, 45 U.S.L.W. 4535 (1977);

and Wooley v. Maynard, ___U.S.___, 97 S.Ct. 1428 (1977).

Furthermore, we believe that abstention is proper for at least two of the reasons specified in Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976), cited in the unpublished order of the Seventh Circuit. First, the federal issue might very well be presented in a different posture by a definitive state court construction of the statutes. Secondly, this case presents difficult questions of state law bearing on policy problems of state-wide public import.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that plaintiffs' motion for summary judgment is denied, their prayer for a preliminary and permanent injunction is denied, and defendants' motion to dismiss is granted, all on grounds of abstention. The Amended Complaint is dismissed

without prejudice.

ENTER:

WILBUR F. PELL, JR.
Circuit Judge

THOMAS R. McMILLEN
District Judge

ALFRED Y. KIRKLAND
District Judge

DATED: Aug. 8, 1977